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Dubious Means to Final Solutions: Extracting Light From the Darkness of Ein Führer and Brother Number One

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DUBIOUS MEANS TO FINAL SOLUTIONS: EXTRACTING LIGHT FROM THE DARKNESS OF EIN FÜHRER AND BROTHER NUMBER ONE

Román Ortega-Cowan

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ROMÁN ORTEGA-COWAN*

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*The imagination and strength of Shakespeare's evildoers stopped
short at a dozen corpses because they had no ideology.¹*

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1. ALEXANDR L. SOLZHENITSYN, *THE GULAG ARCHIPELAGO: 1918-56*, at 173-74 (Thomas P. Whitney trans., 1973).

The Nazis used a legal system to commit genocide; the Khmer Rouge did not. What may seem an insignificant statement, considering the horror of the end results has often overshadowed any focus on methodology, in fact holds the key to a better understanding of humanity's greatest evil. Exploring both the fact of this difference as well as the reasons for its existence presents a focus on the roots as well as the branches, maximizing comprehension of the greater problem of genocide. Analysis reveals the differences were based on disparity in ideology as well as diversity of enemy, and the striking similarity of the horror caused despite such differences.

I. INTRODUCTION

In any analysis, two questions arise. First, why is this undertaking of interest? The novel comparison of two very different perpetrators of genocide is necessary to help the world to realize the poorly understood *how* of humanity's greatest evil as opposed to the more fully explored ethical *why*. Second, how is it helpful? In showing how regimes borne of opposite ideologies and targeting different enemies, yet united by genocidal pursuits, can lead to the same dreadful results, it shall aid human rights advocates in the early recognition of genocide and in arguing that political groups should be included in its definition.

When considering human atrocity, many wish to dismiss its perpetrators as inhuman rather than face the possibility that something entirely human led to such horror.² Indeed, some may object to the exploration of the methods employed by architects of genocide as giving them a human face, rather choosing to dismiss them as monsters. Such dismissal is dreadful, for to give meaning to the words "never again" we must uphold our duty to break the causal chain as early as possible. To do so we must employ knowledge and action in the face of banality.

Part II sets out and defines the terms and concepts of this analysis, explaining why the Nazis and Khmer Rouge are used, as well as giving special treatment to the definition of genocide (detailed ex-

2. In fact, perhaps the most shocking feature of the Holocaust and other atrocities was the critical role played by entirely human traits. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (rev. & enlarged ed., Penguin Books 1983) (describing the role bureaucracy played in the Holocaust); SOLZHENITSYN, *supra* note 1, at 168:

If only it were so simple! If only there were evil people somewhere insidiously committing evil deeds, and it were necessary only to separate them from the rest of us and destroy them. But the line dividing good and evil cuts through the heart of every human being.

. . . .

. . . it is after all only because of the way things worked out that they were the executioners and we weren't.

amination is required due to inherent difficulties in defining the term). Part III briefly describes the Nazi regime and provides a synopsis of the major legal documents used in committing legal genocide against the Jews. Part IV briefly describes the Khmer Rouge regime and provides a synopsis of the major political documents shedding light on its ideology of committing extra-legal genocide against enemies of the state. Part V explains why the Nazis used a legal system and the Khmer Rouge used extra-legal means to commit genocide and what can be learned from this difference in light of the similar results. Finally, Part VI concludes the analysis.

II. TUNING THE PIANO³

The first step to any argument is also the most essential: the definition of terms. What follows is a synopsis of the contextual meaning of this exercise's critical terms and concepts.

A. *The Players: The German Nazis and Cambodian Khmer Rouge*

One has many regimes to choose from in constructing a comparative analysis of perpetrators of genocide—above all, the Nazis and Khmer Rouge stand out. Their differences are striking, yet their qualities may be reduced to where the two appear almost identical. Employing ideologies reaching opposite ends of the political spectrum, each regime delivered a most sinister dictator: the Nazis were ruled by the iron fist of Ein Führer⁴ (Adolf Hitler), the Khmer Rouge by the shrouded talon of Brother Number One (Pol Pot).⁵

3. See JOHN BARTH, *THE FLOATING OPERA* 7-14 (1956). In other words, setting out and defining the terms of analysis.

4. One Leader.

5. The ideological contradiction of using a communist revolution to replace a dictator with another dictator, as displayed by modern communist revolutions (which have almost always stopped short of reaching Marx's final step and, instead, have converted into fascist dictatorships) and the resulting betrayal of the people in whose name the revolutions were conducted, is a testament to the corrupting quality of power and has been documented in literature as well as scholarship. Despite stated political means representing the polar opposite of fascism, the leaders such revolutions have produced are hard to distinguish from the rulers they ousted. See, e.g., GEORGE ORWELL, *ANIMAL FARM* 139 (Signet Classic 1996) (1946) ("The creatures outside looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which."); Vladimir Pozner, *Introduction to KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO* vii, xiv-xv (Bantam Books 1992) (1888):

What certainly did occur in the U.S.S.R. was the abolishing of private property. The same happened in Albania, Bulgaria, China, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, the People's Republic of Korea, Poland, Romania, Vietnam. *But in none of them was public, collective property instituted.* What replaced *private ownership* was *state ownership*. *All the means of production were both de jure and de facto owned, controlled, and run by the state.* That fundamental and irreversible fact is what allows me to say unequivocally that neither socialism nor its supreme state of development, communism, ever existed in the Soviet Union or in any of the other so-called Communist countries.

The Nazis were a fascist group elected and appointed to power in an industrialized Western European nation; the Khmer Rouge conducted a communist revolution within their agrarian Southeast Asian state. The Nazis sought purity of blood by reinventing mankind, targeting the contaminators (Jews) with a system of racist laws that escalated into mass extermination; the Khmer Rouge sought purity of society by reinventing civilization, slowly killing their citizenry first as components through forced labor and relocation and ultimately as political enemies through torture and execution. Both sought a better way of life through the elimination of enemies, were fueled by intense hatred,⁶ and have shown the world just how destructive such motivation can become: the Nazis have set the standard for the modern definition of evil,⁷ and the Khmer Rouge murdered more than one quarter of their own population.⁸

B. A Single Word, Eternal Dread: Genocide

Whereas the concept of genocide is ancient, the roots of the word itself do not run deep. This is important to remember in trying to define genocide, permitting the meaning to be shaped as we better understand the underlying concept rather than holding the Geneva Convention's definition as a stone decree against which all things shall be measured.

1. Lemkin's Quest

Raphael Lemkin, a Jewish lawyer who fled Poland shortly after

Cf. SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 268 (William P. Baumgarth & Richard J. Regan eds., Fathers of the English Dominican Province trans., 1988) (“[I]t regularly happens in the case of tyranny that a latter tyrant is more oppressive than his predecessor, for he does not give up the preceding oppression but rather thinks up new forms out of the malice of his heart.”); “Power is delightful and absolute power is absolutely delightful.” Kenneth Tynan (UK Theatre Critic), *What is Politics? Some Famous Quotes: at* <http://www.arts.adelaide.edu.au/politics/politicsquotes.html> (last visited Aug. 8, 2003) (on file with author).

6. A defining point for both is their extreme hatred for their respective enemies. Although it may be argued that love for their blood and society was primary and hatred of the “threat” thus secondary, the obsession with and overwhelming focus on elimination of the enemy and the almost illusory quality of their “blood” and “society” suggests just the opposite. Hatred has often been noted as the preferred motivation of oppressive regimes, leaving one to wonder about the result had love—for nation, for your people, for anything—taken its place. *See, e.g.,* CHE GUEVARA, *Message to the Tricontinental*, in GUERRILLA WARFARE 160, 173 (Bison Books 1998) (1961):

Hatred as an element of the struggle; a relentless hatred of the enemy, impelling us over and beyond the natural limitations that man is heir to and transforming him into an effective, violent, selective and cold killing machine. Our soldiers must be thus; a people without hatred cannot vanquish a brutal enemy.

7. *See* JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY 317 (1999).

8. *Id.* at 309.

the German invasion in 1939, dedicated his life to lobbying for concrete action against the state-sanctioned mass murder of ethnic and religious minorities.⁹ Lemkin's anti-Nazi activism culminated in the publication of *Axis Rule in Occupied Europe*, a collection of Nazi laws imposed on the occupied territories¹⁰ with which he sought to silence the critics that accused him of blowing Nazi activity out of proportion.¹¹

Inspired by a speech made by Winston Churchill addressing the Nazi activity as a "crime without a name,"¹² Lemkin decided to give it one.¹³ Perhaps *Axis Rule*'s greatest contribution was the world's first definition of genocide:

New conceptions require new terms. By "genocide" we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as tyrannicide, homicide [sic], infanticide, etc. . . . Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.¹⁴

The end of World War II brought the Nuremberg Trial, in which the Allies tried Nazi war criminals for their actions against the Jews and other groups.¹⁵ Despite the success of the tribunal in punishing the defendants in front of it, Lemkin was troubled: although his new word had been mentioned in the proceedings, genocide had been left off the list of crimes for which the defendants had been convicted.¹⁶ In addition, the tribunal continued to show deference to the concept of sovereignty, trying the defendants only for crimes committed after the Nazis had "crossed an internationally recognized border."¹⁷ Lemkin realized the resulting limits of any deterrent effect as it left open the possibility that had "the Nazis . . . exterminated the entire German Jewish population but never invaded Poland, they would not

9. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 17-60 (2002).

10. *Id.* at 38-39.

11. *Id.*

12. WINSTON S. CHURCHILL, 3 THE CHURCHILL WAR PAPERS: THE EVER-WIDENING WAR 1102 (Martin Gilbert ed., 2000).

13. POWER, *supra* note 9, at 29.

14. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944); *see also id.* at 82-90 (describing the types of genocide as political, social, cultural, economic, biological, physical, religious, and moral).

15. POWER, *supra* note 9, at 49-50.

16. *Id.* at 50 (listing crimes against peace, war crimes, and crimes against humanity but leaving out genocide).

17. *Id.* at 49.

have been liable at Nuremberg.”¹⁸ Future regimes would thus theoretically be permitted to commit genocide as long as it was within their own borders. Recognizing that coining the term was not sufficient to end genocide, Lemkin sought out the newly formed United Nations to make a genocide ban part of binding international law.¹⁹

Lemkin’s quest culminated with the United Nations’ adoption of the Genocide Convention,²⁰ marking the first time the United Nations had adopted a human rights treaty.²¹ Article 2 of the Genocide Convention defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a *national, ethnical, racial, or religious group*, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²²

Although the failure of statesmen to invoke it to punish perpetrators of genocide has been sharply criticized,²³ the Genocide Convention has provided the world with a legal definition observed as the modern standard.²⁴ However convenient, this legal definition should not mark the end of critical analysis involved in capturing such an important concept in words.

2. *Room for One More: Political Groups*

Although the final version of the Genocide Convention lists only national, ethnic, racial, and religious groups as protected classes,

18. *Id.*

19. *Id.* at 50.

20. Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 278 [hereinafter Genocide Convention].

21. POWER, *supra* note 9, at 60.

22. Genocide Convention, *supra* note 20, art. 2, 78 U.N.T.S. at 280 (emphasis added).

23. See, e.g., GLOVER, *supra* note 7, at 122 (discussing the instructions given to the Clinton Administration’s State Department not to use the word “genocide” in describing the situation in Rwanda in the 1990s to avoid triggering the Genocide Convention’s legal obligation to take action, and how the UN Security Council followed suit). The focus here is on the Genocide Convention’s definition of genocide rather than on its broader practical failures.

24. See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, art. 6, 37 I.L.M. 999, 1004 (setting forth the International Criminal Court’s definition of genocide, which is identical to that of the Genocide Convention).

earlier versions included political groups.²⁵ The use of the Nazi genocide and its targeting of ethnic and racial groups as a backdrop for the drafters may have led to the later omission of political groups—a more probable explanation is that drafting nations (such as Stalin’s Russia) engaged in deliberate destruction of political groups and did not wish to be charged with genocide.²⁶

Time has exposed the dreadful mistake caused by the omission of political groups from protected classes. The case of the Khmer Rouge genocide has proven difficult—although they attacked Buddhists and ethnic Vietnamese, their main target was what they considered enemies of the state.²⁷ Despite the focused extermination of political groups and the resulting conflict with the Genocide Convention’s definition, the actions of the Khmer Rouge are generally called genocide as their killing fields conjure images of Nazi death camps. According to the Genocide Convention’s definition, the Khmer Rouge could only be tried for the killing of ethnic and religious minorities and would see no punishment for the mass extermination of their true targets, creating a situation almost as odd as the Nuremberg tribunal’s implied acceptance of a theoretical Nazi Germany that murdered all the Jews within its borders without invading Poland. Both situations have arisen out of good intentions; indeed, more is often required.

Although coinage of the term *genocide* was an important step in setting the stage to rid the world of it, danger arises when the word is used not as a beam of light to expose horror but as a blinder to prevent action—the world must focus on pulling perpetrators of genocide out of power, not on pulling the wool over its collective eye. “Language is like a finger that points out the truth, but most people see only the finger, instead of looking deep into the direction the finger is pointing.”²⁸ For the purposes of this exercise, the definition of genocide includes political groups as a protected class—answering

25. Diane F. Orentlicher, *Genocide*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 153, 154 (Roy Gutman & David Rieff eds., 1999).

26. *Id.*

27. *See infra* Part IV.

28. TSAI CHIH CHUNG, *THE TAO SPEAKS: LAO-TZU’S WHISPERS OF WISDOM* 100 (Brian Bruya trans., 1995).

A Buddhist nun named Wujincang said to the Sixth Zen Patriarch, Hui Neng:

“I’d like you to explain a passage in the Nirvana Sutra for me.”

“I’m sorry, but I can’t read. You go ahead and read it to me, and then I will explain it.”

“If you can’t even read the words, how can you understand the principles behind them?”

“The truth is independent of language, language is like my finger; I can point out the moon with it, but it is not the moon. And you don’t need to point at the moon to see it.”

Id.

the victims' call to look beyond the finger (the Genocide Convention's definition).

C. Turning Principles into Action: The Legal System

A legal system is an integral part of any government as it provides the ability to apply a given political framework to the citizenry and put principles into action. Although important, legal systems do not necessarily pervade every aspect of a particular regime's agenda—some things are left to extra-legal means. The Nazi goal was to eliminate the Jews, and they initialized their assault through a framework of specific laws, while the Khmer Rouge violence began as a consequence of their social goal and boiled into an anti-enemy fervor rivaling that of the Nazis.

III. EIN FÜHRER: HITLER'S NAZI GERMANY

Nazi ideology materialized from the combination of three factors: post-World War I anti-Semitism (emotion), Social Darwinist racial theory (science), and Nietzschean belief (reason).²⁹ The Nazis put forth great effort through science and philosophy towards satisfying the apparent urge to legitimize their treatment of the Jews.

Germany's rough terrain had given way to little visitation from outsiders in the ancient world, giving Germans a unique racial unity³⁰ and a special sense of pride in their blood and soil. This view has been recorded as early as 98 AD³¹ and explains the depth of humiliation felt by the proud nation upon losing World War I and having the harsh terms of the Armistice imposed upon her by the victors. Humiliation often leads to anger and the search for a scapegoat upon which to focus it—Adolf Hitler focused his anger on the Jews and expressed it as part of his master plan in *Mein Kampf*,³² which was to become the blueprint of the Third Reich.

Not only were the Jews to blame for the World War I defeat, to the Nazis they were of inferior design. Social Darwinism combined with Mendelian genetics to create a scientific basis for the "Racial Hygiene" movement in Germany.³³ Racial Hygiene, developed as a means of "improving and protecting the gene pool of the [Aryan] race,"³⁴ bolstered racial hatred with "scientific" validation.

29. GLOVER, *supra* note 7, at 317.

30. *Id.* at 319.

31. See CORNELIUS TACITUS, *Germania*, in TACITUS ON BRITAIN AND GERMANY 101 (H. Mattingly trans., 1948).

32. See ADOLF HITLER, *MEIN KAMPF* (Ralph Manheim trans., Houghton Mifflin 1999) (1925) ("My Struggle").

33. GLOVER, *supra* note 7, at 321.

34. *Id.*

Finally, Nietzsche's emphasis on the triumph of the will over emotion gave the Nazis the mental strength to accomplish the horrors of the Holocaust.³⁵ The choice of self-definition through hardness was seen as central to the establishment and assertion of a new national identity, and such emphasis led to a devaluation of human compassion and other emotions.³⁶

With a set ideology of hatred founded upon angry anti-Semitism, a belief in "scientific" racial superiority, and a will immune from emotional influence, the Nazis embarked on a catastrophic mission targeting a clearly defined enemy. After taking control of the government, they quickly built a wall of legal repression around the Jews, which culminated in the Nuremberg Laws and Kristallnacht decrees and left the Jews vulnerable to the violence that lay ahead.³⁷

A. *Rise: In the Name of National Security*

Rising on the shoulders of a government seeking a leader to offset the Communist Party's advances and a citizenry longing for a new national identity, Hitler became Chancellor of Germany in 1933.³⁸ Having already laid his plans for a legal takeover, it is puzzling how he was able to take the inaugural oath with a straight face:

I will employ my strength for the welfare of the German people, protect the Constitution and laws of the German people, conscientiously discharge the duties imposed on me and conduct my affairs of office impartially and with justice to everyone.³⁹

The burning of the Reichstag⁴⁰ provided Hitler with his opportunity to initiate his attack on the German Constitution: in characterizing the blaze as a heinous act of Communist arson,⁴¹ he convinced the President to protect the nation from Communist violence through the issue of decrees suspending the constitutional right of "personal liberty, the right of free expression of opinion, including freedom of the press[,] and the rights of assembly and association."⁴² Freedoms of "speech, . . . freedom from invasion of privacy[,] . . . and from house search without warrant" were also eliminated.⁴³

35. *See id.* at 325-26.

36. *See id.*

37. *See* Peter Pulzer, *Antisemitism*, in *THE HOLOCAUST ENCYCLOPEDIA* 16, 25 (Walter Laqueur & Judith Tydor Baumel eds., 2001).

38. *See* YEHUDA BAUER & NILI KEREN, *A HISTORY OF THE HOLOCAUST* 87-88 (1982).

39. LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS: 1933-1945*, at 48 (1975).

40. The German Legislature.

41. BAUER & KEREN, *supra* note 38, at 93-94. The true identity of the fire's source, whether the Communist Party, the deranged Dutch Communist found at the scene acting alone, or even the Nazi party in an attempt to provide the needed act of terror of which to accuse the communist party, remains a mystery. DAWIDOWICZ, *supra* note 39, at 50.

42. BAUER & KEREN, *supra* note 38, at 94.

43. DAWIDOWICZ, *supra* note 39, at 50.

In the name of national security, Hitler pushed the Enabling Act through the Reichstag. No ordinary piece of legislation, the Enabling Act removed the power of legislation from the Reichstag and gave it to the Nazi-controlled government, thus giving Hitler legal dictatorial powers.⁴⁴ Hitler's plan had come full circle, stemming entirely from a mysterious fire and feeding on national fear of the enemy—concealing his true motives under the banner of national security, Hitler managed to use the system to destroy itself.

B. Building the Wall

The Nazis immediately proceeded to codify earlier anti-Semitic proposals, drawing heavily from Heinrich Class's book, *If I Were the Kaiser*:⁴⁵

All public offices, whether national, state, or municipal, salaried or honorary, are closed to Jews.

Jews are not admitted to serve in the army or navy.

Jews have neither an active nor a passive right to vote. The occupation of lawyer and teacher is forbidden to them, also the direction of theaters.

Newspapers on which Jews work must make that known; newspapers that may be called "German" are not permitted to be owned by Jews or to have Jewish managers or coworkers.

Banks that are not purely personal enterprises are not permitted to have any Jewish directors.

In the future rural property may not be owned by Jews or mortgaged by them.

As compensation for the protection that Jews enjoy as aliens, they must pay double the taxes that Germans pay.⁴⁶

The "Law for the Restoration of the Professional Civil Service" effectively barred Jews from government employ and was later extended to university professors.⁴⁷ Later decrees imposed a 1.5% cap on new admissions of Jews to universities until the total number of non-Aryan students fell to 5% of the total student body,⁴⁸ established a Reich Chamber of Culture which "saw to the exclusion of Jews from cultural and entertainment enterprises,"⁴⁹ excluded Jews from the press (the National Press Law),⁵⁰ banned the *shehitah*,⁵¹ and prohib-

44. *Id.* at 51.

45. DANIEL FRYMANN, WENN ICH DER KAISER WÄR'—POLITISCHE WAHRHEITEN UND NOTWENDIGKITTEN (1912) (Heinrich Class writing under the pseudonym Daniel Frymann).

46. DAWIDOWICZ, *supra* note 39, at 57 (quoting FRYMANN, *supra* note 45, at 76).

47. *Id.* at 58-59.

48. *Id.* at 59.

49. *Id.*

50. BAUER & KEREN, *supra* note 38, at 100-01.

51. DAWIDOWICZ, *supra* note 39, at 60 (ritual Jewish slaughter of animals for food).

ited Jews from inheriting farm property.⁵² In addition, “the Law on the Revocation of Naturalization and Annulment of German Citizenship deprived Jewish immigrants . . . of German citizenship.”⁵³

The legal assault did not end with the living⁵⁴—the development of Nazi Racial Hygiene led to the promulgation of a law requiring sterilization of those with “congenital mental defect, schizophrenia, manic-depressive psychosis, hereditary epilepsy, hereditary chorea, hereditary blindness, hereditary deafness, severe physical deformity, and severe alcoholism.”⁵⁵ This mindset and subsequent codification led to euthanasia programs for the “incurably sick”⁵⁶ and the sterilization of Jews.⁵⁷

C. The Nuremberg Laws

Brick by brick, the Nazis built a wall of disenfranchisement around the Jews that isolated them from all aspects of German society. What had previously been left to anti-Semitic fantasy had become legally-sanctioned reality. As the wall grew in height and thickness, it became easier for the Nazis to add to it.

The birth of the Nuremberg Laws would close the gaps left by the patchwork decrees and consolidate the legal anti-Semitic movement. Whereas earlier decrees isolated the Jewish community from German society in degrees, the Nuremberg Laws finalized perhaps the greatest blow the Nazis could deliver at the time:⁵⁸ officially defining Jews as non-citizens and banning marital relations between Jews and Germans. Despite their confidence and bureaucratic talents, the Nazis ran into a common legislative predicament: the problem of providing statutory definitions for vague yet widely-held conceptions (how to define a Jew, in their case).

52. *Id.* at 60-61.

53. BAUER & KEREN, *supra* note 38, at 101.

54. “Only when the State and the public-health authorities will strive to make the core of their responsibilities the provision for the yet unborn, then we can speak of a new era and of a reconstructed population and race policy.” DAWIDOWICZ, *supra* note 39, at 65 (quoting the address of Wilhelm Frick, the architect of the Nuremberg Laws, to the first meeting of the Council of Experts on Population and Race Policy, June 28, 1933).

55. GLOVER, *supra* note 7, at 322; *see also* DAWIDOWICZ, *supra* note 39, at 65 (describing the use of “Hereditary Health Courts” to order forced sterilizations).

56. BAUER & KEREN, *supra* note 38, at 208.

57. Ronit Fisher, *Medical Experimentation*, in THE HOLOCAUST ENCYCLOPEDIA, *supra* note 37, at 410, 411-12.

58. “After the enactment of the Nuremberg Laws, Jews were no longer allowed to call themselves Germans. The Jewish organizations had to change their names so that they spoke for ‘Jews in Germany’ rather than ‘German Jews.’” DAWIDOWICZ, *supra* note 39, at 193.

1. *Drawing Lines*

The Nuremberg Laws consist of three decrees seeking to effectively isolate Jews from German society and to prevent the further mixing of races.

The first decree ("The Reich Citizenship Law") defined a Reich citizen:

Article 1

1) A subject of the State is a person, who belongs to the protective union of the German Reich, and who, therefore, has particular obligations towards the Reich.

2) The status of the subject is acquired in accordance with the provisions of the Reich- and State Law of Citizenship.

Article 2

1) *A citizen of the Reich is only that subject, who is of German or kindred blood* and who, through his conduct, shows that he is both desirous [sic] and fit to serve faithfully the German people and Reich.

2) *The right to citizenship is acquired by the granting of Reich citizenship papers.*

3) *Only the citizen of the Reich enjoys full political rights in accordance with the provisions of the Laws.*

Article 3

The Reich Minister of the Interior in conjunction with the Deputy of the Fuhrer will issue the necessary legal and administrative decrees for the carrying out and supplementing of this law.⁵⁹

The text of the law on its face seems innocent enough. Upon closer examination, the Article 2 language referring to blood as defining citizenship, the conditioning of citizenship on the grant of certain papers by the government, and the exclusionary statement that only citizens are entitled to full legal rights laid the foundation for total Jewish disenfranchisement. Anyone defined out of the "German or kindred blood" category could be refused papers and thus stripped of any legal protection.

The second decree ("Law for the Protection of German Blood and German Honor") banned the mixing of races as well as showings of German national pride by Jews:

Thoroughly convinced by the *knowledge* that the purity of German blood is essential for the further existence of the German people and intuned by the inflexible will to safe-guard the German nation for the entire future. The Reichs Parliament (Reichstag) has resolved upon the following law unanimously which is promulgated herewith:

59. Reichsbuergergesetz [The Reich Citizenship Law], v. 15.9.1935 (RGB1. I S.1146), reprinted in 1 THE HOLOCAUST: SELECTED DOCUMENTS IN EIGHTEEN VOLUMES 23 (John Mendelsohn ed., 1982) (presenting translation by Fred Niepergall (Sept. 27, 1945)) (emphasis added) [hereinafter THE HOLOCAUST].

Section 1

1. *Marriages between Jews and nationals of German or kindred blood are forbidden.* Marriages concluded in defiance of this law are void, even if, for the purpose of evading this law, they are concluded abroad.

2. Proceedings for annulment may be initiated only by the Public Prosecutor.

Section 2

Relations outside marriage between Jews and nationals of German or kindred blood are forbidden.

Section 3

Jews will not be permitted to employ female nationals of German or kindred blood [under forty-five years old] in their households.

Section 4

1. *Jews are forbidden to hoist the Reichs and national flag and to present the colors of the Reich.*

2. *On the other hand they are permitted to present the Jewish colors.* The exercise of this authority is protected by the State.

Section 5

1. Who acts contrary to the prohibition of section 1 will be punished with hard labor.

2. The man who acts contrary to the prohibition of section 2 will be punished with imprisonment or with hard labor.

3. Who acts contrary to the provisions of sections 3 or 4 will be punished with imprisonment up to a year and with a fine or with one of these penalties.⁶⁰

Through the extension of restrictions from public to private life based on the *knowledge* of racial superiority, this law provided the legal means to prevent further mixing of the races. In a somewhat odd twist, while taking away the rights of Jews to display acts of German pride it granted to them a legal protection: the right to showings of Jewish pride. What may appear to be legal aid was in fact a tactic of further disenfranchisement, encouraging the Jews to isolate themselves.

The third decree, a clarifying regulation promulgated under Section 3 of The Reich Citizenship Law, showed true Nazi colors in making it impossible for Jews to be citizens:

Article 2

. . . .

60. Gesetz zum Schutze des Deutschen Blutes und der Deutschen Ehre [Law for the Protection of German Blood and German Honor], v. 15.9.1935 (RGB1. I S.100), reprinted in 1 THE HOLOCAUST, *supra* note 59, at 24 (presenting translation by T.W. Schonfeld (Nov. 17, 1945)) (emphasis added). This particular translation omits the section 3 “under forty-five years old” language commonly found in other translations. See, e.g., LUCY S. DAWIDOWICZ, A HOLOCAUST READER 48 (1976).

(2) *An individual of mixed Jewish blood [Mischling], is one who descended from one or two grandparents who were racially full Jews, insofar as does not count as a Jew according to Article 5, paragraph 2. One grandparent shall be considered as full-blooded Jew if he or she belonged to the Jewish religious community.*

Article 3

Only the Reich citizen, as bearer of full political rights, exercises the right to vote in political affairs, and can hold a public office. . . .

Article 4

(1) *A Jew cannot be a citizen of the Reich.* He has no right to vote in political affairs, he cannot occupy a public office.

. . . .

Article 5

(1) *A Jew is anyone who descended from at least three grandparents who were racially full Jews.* Article 2, par. 2, second sentence will apply.

(2) A Jew is also one who descended from two full Jewish parents, if:

(a) he belonged to the Jewish religious community at the time this law was issued, or who joined the community later.

(b) he was married to a Jewish person, at the time the law was issued, or married one subsequently.

(c) he is the offspring from a marriage with a Jew . . . which was contracted after the Law for the protection of German blood and German honor became effective

(d) he is the offspring of an extramarital relationship, with a Jew, . . . and will be born out of wedlock after July 31, 1936.⁶¹

The Reich Citizenship Law's gaps were thus filled as the Nazis clarified the goal of denying Jews citizenship status and, thus, legal protection. Although intended to clarify, the regulation exposed a major problem—definitions.

2. *Defining Mischlinge*

What seemed obvious to the Nazi lawmakers in discussion and propaganda had become a problem that grew only more evasive as more work was put into it: how to define a Jew? As in any law, the problem lay not in the black and white (full-blooded Aryans vs. full-blooded Jews) but in the gray (Mischlinge—those of mixed blood). The distinction was significant as section 2(2) of the Regulation defined Mischlinge as non-Jews and thus permitted them to become

61. Erste Verordnung zum Reichsbürgergesetz [First Regulation to the Reichs Citizenship Law], v. 14.11.1935 (RGB1. I S.1333), reprinted in 1 THE HOLOCAUST, *supra* note 59, at 31-32 (presenting translation by Fred Niebergall (Sept. 28, 1945)) (emphasis added). A copy of the original document may be found at, 1 THE HOLOCAUST, *supra* note 59, at 27-30. This particular translation omits the article 2(2) "*Mischling*" term commonly found in other translations (the plural is "*Mischlinge*"). See, e.g., DAWIDOWICZ, *supra* note 60, at 46.

citizens of the Reich and avoid the full Nazi intent of the Nuremberg Laws.

The Nazis settled on classifying “[p]ersons with two Jewish grandparents . . . as half-Jews or Mischlinge of the first degree, and those with one Jewish grandparent . . . as quarter-Jews or Mischlinge of the second degree.”⁶² To avoid confusion, the government produced special flow charts to help determine race.⁶³ Where proper genealogical records were unavailable, physical examinations were conducted to determine a given person’s racial traits.⁶⁴ Both degrees of Mischlinge were eligible for Reich citizenship under the Regulation, although the government reserved discretionary cancellation authority.⁶⁵ Despite the efforts at definition and focus on purity of blood, religious affiliation remained a defining factor (an obvious contradiction in terms): Mischlinge of the first degree that were members of the Jewish religious community as well as Christian converts to Judaism were defined as full Jews.⁶⁶

D. *The Kristallnacht*⁶⁷ Decrees

Just as the Reichstag fire provided Hitler with the opportunity to begin his legal quest for dictatorship, the assassination of a German diplomat in Paris by a Jewish student gave rise to the opportunity for a major assault on the Jewish community in Germany. Although Hitler never publicly commented on the assassination, he was overheard stating, “the SA [the Nazi party’s uniformed division] should be allowed to have a fling.”⁶⁸ The resulting “fling” was Kristallnacht, a pogrom of unprecedented proportion reaching every corner of the Reich, leading to the mass destruction of Jewish property.⁶⁹

Whereas the Nazis had increased legal repression of the Jews by degrees up to this point, the absurdity of the decrees following Kristallnacht reflect how much the Nazi legal assault had developed. Not only had the Nazis destroyed Jewish property, they made them

62. Annegret Ehmman, *Mischlinge*, in THE HOLOCAUST ENCYCLOPEDIA, *supra* note 37, at 420, 422-23.

63. *Id.* at 421 (presenting a copy of one such flow chart).

64. *Id.* at 423; *see also id.* at 422 (displaying a picture of a young man having the dimensions of his skull measured).

65. *Id.* at 423.

66. *Id.*

67. “Crystal Night,” referring to the amount of broken glass lying in the streets the following morning. *See* Karol Jonca, *Kristallnacht*, in THE HOLOCAUST ENCYCLOPEDIA, *supra* note 37, at 385.

68. DAWIDOWICZ, *supra* note 39, at 101.

69. Jonca, *supra* note 67, at 388-89.

legally responsible for the costs of repair (part of the “cold joke”⁷⁰ Nazi mentality):

Section 1.

All damages which were caused to Jewish business houses and dwellings by the revolt of the people against the agitation of international Jewry against National Socialist Germany on November 8, 9 and 10, must be remedied immediately by the Jewish owners or Jewish business people.

Section 2.

The costs of repairs must be borne by the owners of the Jewish business houses and dwellings.

Insurance claims of Jews of German nationality will be confiscated in favor of the Reich.⁷¹

In direct response to the assassination of the German diplomat, an exorbitant fine was issued to the Jewish community for the actions of the one student in Paris.⁷²

The inimical attitude of the Jews towards the German people and Reich, *which does not even hesitate to commit dastardly murders*, calls for a defensive and severe expiation.

....

Section 1.

Payment of a contribution of one billion marks to the German Reich is imposed upon the Jews of German nationality in their entirety.⁷³

As a final blow, the Nazi government issued a third decree banning the Jews from all aspects of economic life:

Section 1.

As from January 1, 1939, Jews [as defined in Section 5 of The Reich Citizenship Law Regulation of November 14, 1935] . . . will be prohibited from operating retail stores, distributing and mail order houses or delivery offices, and from carrying on a trade independently.

70. See GLOVER, *supra* note 7, at 341-42 (describing the “cold joke” as a Nazi tool of dehumanization, invoking contemptuous laughter through the creation of absurd situations surrounding desecration and execution; for example, creating an Auschwitz prisoner orchestra and forcing them to play the Tango while people were shot and graves were dug).

71. Decree for the Restoration of the Appearance of the Streets in the Case of Jewish Business Enterprises, v. 12.11.1938 (RGB1. I S.189), *reprinted in* 1 THE HOLOCAUST, *supra* note 59, at 161 (presenting translation by Prentiss Gilbert (Nov. 17, 1938)).

72. Cf. Geneva Convention Relative to the Protection of Civilian Persons, adopted Aug. 12, 1949, pt. 3, art. 33, 6 U.S.T. 3517, 3538 (“No protected person may be punished for an offense he or she has not personally committed.”); *see also* Daoud Kuttab, *Collective Punishment*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW, *supra* note 25, at 89 (describing the present illegality of collective punishment).

73. Decree Covering Payment of a Fine by Jews of German Nationality, v. 12.11.1938 (RGB1. I S.189), *reprinted in* 1 THE HOLOCAUST, *supra* note 59, at 158 (presenting translation by Prentiss Gilbert (Nov. 17, 1938)) (emphasis added).

Furthermore, . . . they are prohibited from offering goods or industrial services at markets of any kind, fairs or exhibitions, from advertising them or from accepting orders for them.⁷⁴

E. Laying the Foundation for the Final Solution

The stage had been set: rather than begin by exterminating the Jews, the Nazis slowly dehumanized and separated them from German society using their legal system. Total legal isolation throughout the Reich⁷⁵ led to relocation to ghettos, and it was an easy transition when the time came for implementation of the Final Solution. In removing any hope of citizenship and, thus, state legal protection, the ability to participate in the political system, the chance of economic livelihood outside the Jewish community, and the opportunity to create humanizing bonds with Germans, the laws drew the line that would eventually determine who would be sent to the death camps.⁷⁶

IV. BROTHER NUMBER ONE: POL POT'S DEMOCRATIC KAMPUCHEA

Khmer Rouge ideology was shaped in the spirit of Stalin⁷⁷ and Mao:⁷⁸ experimenting with the total redesign of society in search of an enlightened state, regardless of consequence. Tragically, the consequences materialized as the annihilation of the Cambodian people, which climaxed as the regime grew obsessed with purification (means) and lost sight of the enlightened state (end). The Khmer

74. Decree to Eliminate the Jews from German Economic Life, v. 12.11.1938 (RGB1. I S.189), *reprinted in* 1 THE HOLOCAUST, *supra* note 59, at 159 (presenting translation by Prentiss Gilbert (Nov. 17, 1938)).

75. The Nazis imposed genocide legislation upon the legal systems of its occupied territories. LEMKIN, *supra* note 14, at 138-39, 143 (Czechoslovakia); 399-402 (France); 188-89 (Greece); 196-97, 440-43 (Luxemburg); 213, 504-05 (Norway); 222-23, 552-55 (Poland); 236-37 (Union of Soviet Socialist Republics); 243-45, 249-50, 259-64, 625-27 (Yugoslavia).

76. See DAWIDOWICZ, *supra* note 39, at 89.

77. See e.g., SOLZHENITSYN, *supra* note 1, at 69-70. At the end of a Party conference in Moscow Province, a tribute to Stalin was called for. Everyone stood and clapped wildly, for three minutes, then four, then five. The clapping became more painful. It was a kind of physical embodiment of the trap people were in. Who would dare to be the first to stop? The Secretary did not dare, as his predecessor had been arrested, and the NKVD men were there watching. The painful applause went on past ten minutes, with everyone trapped in it. Among those on the platform was the director of a paper factory. After eleven minutes of applause, he sat down, followed by everyone else. That night, he was arrested. He was given ten years on some pretext, but his interrogator told him never to be the first to stop applauding. *Id.*

78. See, e.g., GLOVER, *supra* note 7, at 287:

Mao did not want to hear reports of famine, which he thought were being spread by rich peasants who did not want to hand over grain. His response was a drive against "grain concealment," which resulted in purges and many suicides. Some who denied there was any grain were beaten or tortured. Some were left naked to freeze to death in the snow. Some were buried alive. The 1959 harvest was at least 30 million tonnes less than the previous year's, but officials found it prudent to report large increases.

Rouge sought purity through the eradication of impure Western ideas, which led to the elimination of people through calculated violence rather than law. The spectacle of the project's size, the rigidity and fervor of the coercive revolutionaries, and the sheer inhumanity of the belief in re-education or execution rather than systemic evolution were traits the Khmer Rouge shared with the regimes of Stalin and Mao. Indeed, the movement was doomed to repeat its predecessors' mistakes.⁷⁹

Despite the declared intent of liberating the people of Cambodia from a dictator and the grip of oppressive imperialism, the Paris-educated intellectuals leading the Khmer Rouge had a different agenda: "The good of the people was not the goal . . . its aim was to prove a theory that had been worked out in the abstract without the slightest regard for human factors."⁸⁰ The starting point was to be the return of the Cambodian people to the fields that gave birth to their culture and to put them to work growing rice.

A. Rise: In the Name of Liberation

The Khmer Rouge overthrew the U.S.-backed Lon Nol government on April 17, 1975, taking the capital city of Phnom Penh and forcing the immediate evacuation of its two million inhabitants.⁸¹ Residents of all cities and towns across the nation were to follow suit, leaving behind their homes and belongings to take to the roads leading out to the fields on foot. No one was spared—even hospitals were emptied, giving rise to surreal scenes:

Thousands of the sick and wounded were abandoning the city. The strongest dragged pitifully along, others were carried by friends, and some were lying on beds pushed by their families with their plasma and IV bumping alongside. I shall never forget one cripple who had neither hands nor feet, writhing along the ground like a severed worm, or a weeping father carrying his ten-year-old daughter wrapped in a sheet tied around his neck like a sling, or the man with his foot dangling at the end of a leg to which it was attached by nothing but the skin.⁸²

For some, the forced relocation took weeks. Many died of disease and exposure, and the Khmer Rouge executed anyone suspected of having ties to the old regime; piles of dead Lon Nol soldiers symbolically lined the roads.⁸³ Soldiers forced children to watch their parents' execution and threatened them with a similar fate if they cried

79. *Id.* at 311.

80. FRANÇOIS PONCHAUD, *CAMBODIA YEAR ZERO* 22 (Nancy Amphoux trans., 1978) (1977).

81. *Id.* at 3-22.

82. *Id.* at 6-7.

83. *See, e.g., id.* at 48 (presenting a refugee's first-hand account).

too loud for “the enemy.”⁸⁴ Radio programs spewed forth propaganda: “[T]he worksites resounded with the joyful cries of the peasants going to work.”⁸⁵

The Khmer Rouge sought a new beginning to Cambodia, declaring it Democratic Kampuchea and turning the clock back to year zero.⁸⁶ The rebirth of the nation into a pure society was to be achieved through the elimination of all remnants of the oppressor classes and the prevention of further influence, leading to the closing of all borders and the ceasing of communication with the outside world.⁸⁷ Individualism was thought to leave one open to Western influence and thus cities, private ownership of property, money and markets were to be purged.⁸⁸ The Khmer Rouge extended the cleansing to all areas, banning musical instruments, furniture, religion, and the family unit (forcing communal living and eating, and teaching children to spy on their parents).⁸⁹ Pursuant to Mao’s “blank slate” theory (focusing on the uneducated, as the educated’s slate has already been written upon), education implied infection with Western ideals and threatened purity.⁹⁰ Thus, those who could speak a foreign language and even those wearing glasses, as that implied the ability to read, were executed.⁹¹ The concept of voluntarism led to the belief that any work project could be completed provided enough workers indoctrinated with proper revolutionary consciousness were involved, regardless of lack of skill or technology.⁹²

B. Year Zero

Despite the terrifying efficiency with which the birth of the revolution was carried out, the movement’s leaders—the “Center”—and their methods of rule were shrouded in mystery. Pol Pot did not disclose his identity or acknowledge the existence of the new government for two years after the victory, rather choosing to hide behind the exiled Prince Norodom Sihanouk, the head of the monarchy overthrown by the Lon Nol regime. Very few documents exist other than

84. See GLOVER, *supra* note 7, at 300.

85. *Id.*

86. PONCHAUD, *supra* note 80, at 192:

On April 17, 1975, a society collapsed; another is now being born from the fierce drive of a revolution which is incontestably the most radical ever to take place in so short a time. . . .

. . . Using class inequality and racial animosity as tools, a handful of ideologists have driven an army of peasants to bury their entire past.

87. See Sydney Schanberg, *Cambodia*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW, *supra* note 25, at 58.

88. GLOVER, *supra* note 7, at 303-04.

89. *Id.*

90. Schanberg, *supra* note 87, at 59.

91. See *id.*

92. GLOVER, *supra* note 7, at 304.

the Constitution of Democratic Kampuchea, the others being mostly transcripts of meetings and internal documents. Starting with internal spoken guidelines and an oppressive constitution, the reclusive Center made it so their people lived in a state of flux, fearing the whims of the oppressive “liberators.”

1. *Pol Pot's Eight Points*

Although Pol Pot kept his identity and the regime hidden from his citizens and the outside world, he was busy establishing the revolutionary framework. Technically meeting as Sihanouk's government, the Center's first major attempt to distribute a political plan took place during a national congress (May 20-24, 1975) attended by representatives from all sections of the regime.⁹³ No written documents have survived, but firsthand accounts have provided a list of guidelines Pol Pot presented in a speech:

1. Evacuate people from all towns.
2. Abolish all markets.
3. Abolish Lon Nol regime currency and withhold the revolutionary currency that had been printed.
4. Defrock all Buddhist monks and put them to work growing rice.
5. Execute all leaders of the Lon Nol regime beginning with the top leaders.
6. Establish high-level cooperatives throughout the country, with communal eating.
7. Expel the entire Vietnamese minority population.
8. Dispatch troops to the borders, particularly the Vietnamese border.⁹⁴

This list summarizes the methods employed to further the Center's basic ideas: destruction of the previous regime (execution of the Lon Nol leadership), elimination of private property and individualism (town evacuation, market and currency abolishment, cooperative establishment), removal of potential enemies (expulsion of the Vietnamese minority population, defrocking Buddhist monks), and regime preservation (placement of troops along the Vietnamese border).

2. *The Constitution of Democratic Kampuchea*

By the time Sihanouk returned to Cambodia, the Center had met twice more under the guise of his leadership and adopted the Constitution of Democratic Kampuchea, which codified what had been vio-

93. BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79*, at 55 (1996) [hereinafter *THE POL POT REGIME*].

94. *Id.* Other accounts have added the order to close schools and hospitals. *Id.* at 56.

lently enforced since the revolutionary victory.⁹⁵

The preamble of the constitution starts out innocently enough: “Whereas the entire Kampuchean people . . . desire . . . [a] Kampuchea enjoying . . . a national society informed by genuine happiness, equality, justice, and democracy, without . . . exploiters or exploited, The Constitution of Kampuchea stipulates as follows[.]”⁹⁶ However, the chapters of the constitution resemble tools of coercion rather than guarantees of freedom, as all rights are based on national health, and many significant measures are left broad or undefined.

The constitution established the “culture” of the new nation:

CHAPTER THREE

Culture

Article 3

The culture of Democratic Kampuchea is of a national, popular, forward-looking, and healthful character *such as will serve the tasks of defending and building Kampuchea into an ever more prosperous country.*

*This new culture is absolutely opposed to the corrupt, reactionary culture of the different oppressive classes of colonialism and imperialism in Kampuchea.*⁹⁷

This is particularly odd, as cultures generally bear constitutions rather than vice versa. The intent of the drafters is apparent, considering the emphasis on the advancement of Democratic Kampuchea and the stated “cultural” opposition to imperialism.

The framework for the administration of justice was given simple treatment, and violations of law were broadly defined as acts threatening the government:

CHAPTER SEVEN

Justice

Article 9

Justice is administered by *people’s courts*, which represent and defend the people’s justice, defend the democratic rights of the people, and punish any act directed against the people’s State or violating the laws of the people’s State.

. . . .

Article 10

Actions violating the laws of the people’s State are as follows:

Hostile and destructive activities that threaten the popular State shall be subject to the severest form of punishment.

95. ELIZABETH BECKER, WHEN THE WAR WAS OVER: THE VOICES OF CAMBODIA’S REVOLUTION AND ITS PEOPLE 218 (1986).

96. DEMOCRATIC KAMPUCHEA CONST. pmbl. (1976), *reprinted in* PONCHAUD, *supra* note 80, at 199.

97. *Id.* at 200-01 (emphasis added).

Other cases shall be handled by means of *constructive reeducation* in the framework of the State or people's organizations.⁹⁸

Codified ambiguity in defining crime and punishment served a dual purpose for the Khmer Rouge: they could both arrest and execute at will those considered political enemies.

As for civil liberties, the only specific right guaranteed to the people was the right to work:

CHAPTER NINE

The Rights and Duties of the Individual

Article 12

Every citizen of Kampuchea is fully entitled to a constantly improving material, spiritual, and cultural life. *Every citizen of Kampuchea is guaranteed a living.*

All workers are the masters of their factories.

All peasants are the masters of the rice paddies and fields.

All other working people have the right to work.

There is absolutely no unemployment in Democratic Kampuchea.

Article 13

There must be complete equality among all Kampuchean people in an equal, just, democratic, harmonious, and happy society *within the great national union for defending and building the country.*

....

Article 14

*It is the duty of all to defend and build the country together in accordance with individual ability and potential.*⁹⁹

Despite making all workers masters of their respective work areas, the constitution is silent as to the master of the people: in reality, the Center. Other rights, implicit in the complete equality requirement, rely on the health and progress of the state. In addition to the granting of "rights," the constitution makes it the explicit duty of each citizen to further the goals of the state.

An apparent grant of religious freedom essentially negates itself:

CHAPTER FIFTEEN

Worship and Religion

Article 20

Every citizen of Kampuchea has the right to worship according to any religion and the right not to worship according to any religion.

*All reactionary religions that are detrimental to Democratic Kampuchea and the Kampuchean people are strictly forbidden.*¹⁰⁰

98. *Id.* at 202 (emphasis added).

99. *Id.* at 203 (emphasis added).

100. *Id.* at 205 (emphasis added).

Again, the focus on national health and ambiguity in “reactionary religions” seems to erode citizens’ rights rather than add to them.

Assembly elections were held pursuant to other chapters of the constitution, and the newly-formed assembly accepted Sihanouk’s resignation.¹⁰¹ The power vacuum enabled Pol Pot’s government to officially take power, although it had actually been in control since the seizing of Phnom Penh.¹⁰²

While citizens seeking to create a guarantee of rights greater than their governors normally adopt constitutions, the Constitution of Democratic Kampuchea was the Center’s first and only attempt to codify its oppressive ideology. As it was never used to any effect, it thus appears to merely symbolize the revolution rather than form an effective guarantee of citizens’ rights or a serious tool of coercion. Whereas the Nazis built a legal framework in degrees to use against the Jews, the Khmer Rouge leadership’s use of law ended¹⁰³ with this nominal document.

C. *Fumbling Towards Utopia*

A sense of uninformed optimism pervades the Center’s main documents. What follows is a synopsis of three of the few surviving records—transcripts of a meeting, one of Pol Pot’s speeches, and the Four-Year Plan.

1. *Minutes from a Center Meeting*

Shortly before Sihanouk’s resignation, the Center met privately to discuss plans to form the official revolutionary government. A transcript of the meeting (March 30, 1976) is all that remains. While the constitution refers to undefined punishments for crimes against the state, the opening section of the transcript clarifies that political murder would be an integral part of the system of dealing with opponents: “The Authority to Smash (People) Inside and Outside the Ranks. . . . Let there be a framework of procedures for implementing our revolutionary authority.”¹⁰⁴ Although the language is obscure, the intent is clear: “smash” is the term the Center was known to use in place of “kill.”¹⁰⁵ The remainder of the document consists of plans to

101. BECKER, *supra* note 95, at 220.

102. *Id.*

103. Or perhaps it never began—the constitution was seemingly forged out of habitual obligation rather than practical necessity, and it would be hard to believe the Center would intend to create a document that would limit their powers.

104. “*Decisions of the Central Committee on a Variety of Questions*” (Mar. 30, 1976), in POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976-1977, at 3 (David P. Chandler et al. eds., Ben Kiernan & Chanthou Boua trans., 1988) [hereinafter POL POT PLANS THE FUTURE].

105. *See id.* at 1.

remove Sihanouk, rice production strategy, and discussion as to which Center members would hold office (with Pol Pot as Prime Minister).¹⁰⁶

2. *Excerpts from Pol Pot's Speech to a Zone Assembly*

Pol Pot's remarks in an assembly meeting (June 3-7, 1976) foreshadow the dire situation ahead, resulting from impossible demands made by an oppressive leader who does not understand the task at hand. The theory is "rapid agricultural development without mechanization"¹⁰⁷—not only does Pol Pot demand a major increase in production, he requires the elimination of means developed to increase production. He sets the mark at three tons of rice per hectare, a dramatic increase from previous average yields of one ton per hectare, likely sustained by the desire to effect change overnight.¹⁰⁸ Further, Pol Pot estimated that production should increase to ten or eleven tons per hectare by 1980—an absurd figure.¹⁰⁹

The practical difficulty of the Center's placement of party ideology above all else is clear, as solutions to basic agricultural problems are explained as solvable by political means:

The problem of feed for oxen and buffaloes. Can we resolve the problem of insufficient pasture or not? We have said that in some places buffaloes and oxen are skinny. At first glance it seems as if the socialist system is inferior to the private (one). But really this problem is only temporary. It is an infantile disease of socialism. This is a secondary contradiction, incapable of blocking our offensives.

Our system is already socialist, but its philosophy and consciousness are not yet clear. So we continue to provide education in politics and consciousness, and draw experiences. We can certainly resolve the problem, and concretely, we have every possibility.¹¹⁰

Instead of introducing a plan for increasing pastureland, for example, Pol Pot sees party education as the answer. Despite Pol Pot's fervor in implementing the revolution, his lack of understanding of agriculture is evident as he discusses obvious facts as if they were revolutionary ideas: "Grass is not a primary resource imported from overseas. It is to be found in our country. . . . So if we have a socialist revolutionary consciousness, we can fully prepare to organize and

106. *Id.* at 3-8.

107. "Excerpted Report on the Leading Views of the Comrade Representing the Party Organization at a Zone Assembly" (June 1976), in *POL POT PLANS THE FUTURE*, *supra* note 104, at 9.

108. *Id.* at 9-10.

109. *Id.* at 11.

110. *Id.* at 22.

implement assignments according to the new situation.”¹¹¹ Further, some of his statements of national pride make no sense whatsoever: “Compared to other countries, we have very many more qualities. First, they have no hay. Second, they have no grass.”¹¹²

Finally, Pol Pot describes the zone in which the Center resides as the poorest, having few natural resources.¹¹³ Rather than setting this as a reason for compensation from other zones, he considers this shortage the rationale for demanding high performance—recall his belief that agricultural progress springs forth from political alignment rather than soil quality, for example.¹¹⁴

No reference is made to the existing situation or any starting point; these figures and explanations reveal themselves to be intellectual dreams rather than plausible agricultural reality. Tragedy clearly lies ahead, for impossible goals enforced by torture and execution can lead to the destruction of an entire population—“We do not blame the objective conditions,”¹¹⁵ but only the people that rely on them to accomplish our demands.

3. *The Four-Year Plan*

The Four-Year Plan (July-August, 1976) was to provide the practical framework for achieving Center goals, including the ever-present three tons per hectare target, yet is full of weak assumptions. True to Center form, the Plan was never published, nor was most of it (mostly the parts dealing with citizen welfare) put into action.¹¹⁶

Irrigation was a major problem and the Center planned to solve eighty to ninety percent of it by 1980;¹¹⁷ no specific guidelines on how to accomplish this feat other than the obvious (forced labor of politically-aligned citizens) were provided. The malaria problem was to be reduced seventy to one-hundred percent by 1980, but the Plan provided no direction other than the provision of “an organisation to assign and accept responsibility . . . [and] to produce equipment and carefully supply necessary medicine.”¹¹⁸

The Center’s detachment from the people is evident in the Plan’s section on raising the people’s standard of living, in which they list material needs in a haphazard fashion: from “water pitchers,” to

111. *Id.* at 19.

112. *Id.*

113. *Id.* at 33.

114. *Id.* at 33-34.

115. *Id.* at 12.

116. “*The Party’s Four-Year Plan to Build Socialism in All Fields*” (July-Aug. 1976), in POL POT PLANS THE FUTURE, *supra* note 104, at 36 (Chanthou Boua trans.).

117. *Id.* at 38, 89 tbl.38.

118. *Id.* at 110 tbl.59.

“medicine,” to “shovels,” to “lamps,” ending with “etc.”¹¹⁹ The Plan promises special rest homes for the elderly,¹²⁰ but conjures the image of Boxer’s fate.¹²¹ Education is treated briefly and focuses heavily on practical training.¹²² The new culture is based on propaganda and is discussed in a characteristically absurd fashion: “*Art*: Step-by-step (a little is enough) in order not to disturb the productive forces raising production.”¹²³

D. Implosion

Extreme production demands coupled with the belief in a tie between production and political alignment rather than technology or skill set the stage for disaster—when quotas were not met, political enemies were blamed and a nationwide purge was conducted. As the obsession with enemies grew, camps were set up to manage the mass torture and execution of enemies.¹²⁴ The most notorious torture camp, Tuol Sleng, was set up on the grounds of a former school in a horribly surreal turn of events.¹²⁵ Men, women, and children were sent there almost at random to be tortured into “confessing” their insubordination, after which they were executed.¹²⁶ The paranoia knew no boundaries, as the purge extended to even the high ranks of the Center—Minister of Information Hu Nim, one of the original Khmer Rouge leaders, was arrested on suspicion of subversion, tortured into writing a “confession” detailing his service to the CIA, and executed.¹²⁷

The Khmer Rouge consequentialist ideology proposed the transformation of society at any cost. Impossible demands based on illogical grounds, yet enforced with unthinkable cruelty, led to two million deaths out of a population of less than eight million; sixteen thousand people were tortured and executed in Tuol Sleng alone during the “enemy” purges.¹²⁸ Although the Khmer Rouge started with a constitution, their ultimate plans were set out in secret documents,

119. *Id.* at 111.

120. *Id.* at 112.

121. ORWELL, *supra* note 5, at 114-15, 122-24 (The pigs initially promised a rest home for retired animals, but when Boxer, the strongest and most loyal of the animals, became injured and was to take residence in such a home the pigs sold him to a glue factory.).

122. “*The Party’s Four-Year Plan to Build Socialism in All Fields*” (July-Aug., 1976), *supra* note 116, at 113-15.

123. *Id.* at 114.

124. GLOVER, *supra* note 7, at 308.

125. *Id.*

126. *See, e.g., id.*

127. “*Planning the Past: The Forced Confessions of Hu Nim*” (May-June, 1977), in *POL POT PLANS THE FUTURE*, *supra* note 104, at 227, 233-317 (reprinting the entire written confession).

128. GLOVER, *supra* note 7, at 309.

and enforcement was conducted through blind, violent force rather than rule of law.

V. EXTRACTING LIGHT FROM DARKNESS

The Nazis used a legal system to commit genocide; the Khmer Rouge did not. While the Nazis conducted their assault on the Jews through laws such as the oppressive preliminary orders, the Nuremberg Laws, and the Kristallnacht decrees, the Khmer Rouge eliminated their political enemies as a consequence of their social experiment without using formal laws. Having established this difference through discussion of the methods used by the two regimes, analysis now turns to why this difference exists: disparity in ideology and diversity of enemy.

While fascist Nazi ideology embraced bureaucracy and law, the revolutionary Khmer Rouge leaders were ill suited for civil service and thus ruled by sheer force and terror. The Nazis targeted physically discernible, explicit enemies and were thus able to design specific laws targeting them; the Khmer Rouge sought implicit enemies elusively delineated by state of mind and chose random arrests and torture room confessions over any attempt at statutory definition (the difficulty of defining such an enemy would likely result in too narrow a term).

A. *Disparity in Ideology*

Whereas bureaucracy played a major role in the lives of the civil servants of the fascist Nazi regime, the Khmer Rouge revolutionaries had no government experience and had difficulty establishing a bureaucracy of their own. The notion of law was second nature to the Nazis; the Khmer Rouge had little patience for it and stuck to their rifles.

1. *Institution—Nazis*

Politics bore the Nazi regime; a pre-packaged institution, providing the implementing framework for centralized power as a tenet of fascism. Although Hitler initially altered the system to grant himself dictatorial authority, it remained intact. The Nazis were skilled civil servants, embracing bureaucracy and eager to take up their respective roles in the new government as noble cogs in the Third Reich machine. The level of involvement required to later conduct the Final Solution, due to its sheer magnitude, sheds light on the “programmed” bureaucrat mentality innate in members of the Nazi party: “At issue in assessing the notion of the banality of evil is an understanding of not only those who did the actual killing but also the great army of ‘desk murderers’ . . . who took charge of transporta-

tion, scheduling, construction, and disposal of the Jews' property."¹²⁹ The use of a legal system to pursue the regime's goals was natural, especially considering the basic Nazi policy of legitimizing the persecution of the Jews through science and other social institutions as well as the belief in law as the ghost in the bureaucratic machine.

2. *Revolution—Khmer Rouge*

Violence bore the Khmer Rouge regime and was to define its rule. The use of violent struggle to overcome an existing administration is one thing, but it is indeed an entirely different state of affairs for the guerillas to lay down their arms and set up a functioning government. The problem of institutionalizing a revolution is complicated, considering the terms are almost mutually exclusive:

Revolutionary movements are poorly suited to becoming functioning regimes—the process is painful and contradictory. Revolutionary movements, after all, focus on seizing nations rather than administering them; they are geared toward war. Revolutionaries, for the most part, lack bureaucratic skills and are contemptuous of “government.”¹³⁰

Having known success only through violence, the Center believed that revolutionary vehemence was a sufficient credential for governing despite a lack of any civil service experience¹³¹—thus, the leaders were poorly suited to the workings of government.¹³² Although they initially adopted a constitution, records of official rule consist mostly of transcripts of secret meetings. There was no law other than rifle-toting Khmer Rouge loyalists shouting orders, perhaps because it was too much trouble to build a legal system when the policy of violence that led to revolutionary success could just as easily be applied to force the citizenry into compliance:

The Khmer Rouge were living proof that power does not grow out of a gun. The rifles of the Khmer Rouge destroyed the old power, but those same guns could not in the end create a new power base. That requires a degree of popular support and understanding of the new order that the Khmer Rouge never cultivated or won. They ruled, instead, through violence and terror.¹³³

129. See Michael R. Marrus, *Historiography*, in THE HOLOCAUST ENCYCLOPEDIA, *supra* note 37, at 279, 283; see also ARENDT, *supra* note 2.

130. DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 112 (1992).

131. *Id.*

132. Cf. JON LEE ANDERSON, CHE GUEVARA: A REVOLUTIONARY LIFE 453-55 (1997) (discussing Che Guevara's appointment as head of the Cuban National Bank despite having no relevant experience whatsoever).

133. BECKER, *supra* note 95, at 221. “To substitute violence for power can bring victory, but the price is very high . . . the end will be the destruction of all power.” *Id.* (quoting Hannah Arendt).

B. Diversity of Enemy

Emphasis on purity of race made the removal of Jews from German society a founding principle of the Nazi party; forced labor and relocation pursuant to the Khmer Rouge consequentialist emphasis on purity of society caused the deaths of many Cambodians and led to the purge of political enemies as the grand plans failed. Whereas the Nazis were able to single out their enemies based on discernible physical characteristics and lineage documents, the Khmer Rouge's enemies were such based on belief and thus could be anyone.

1. Picking Out the Rotten Fruit—Nazis

The Nazis targeted an explicit enemy; the Jews were attacked based on their blood and physical characteristics, and as they were thus distinguishable from Germans, they made for an easy target. The Nazi persecution of the Jews was a process similar to picking rotten fruit out of the basket and leaving the good fruit in place. Law was the most efficient way to draw the line between Jews and Germans and was possible because the enemy was obvious.

2. Overturning the Basket—Khmer Rouge

The Khmer Rouge targeted an implicit enemy; political enemies were attacked based on their anti-revolutionary beliefs. The purge was similar to overturning the fruit basket¹³⁴—there was a presumption of guilt and apparently no good fruit. The Center did not codify their central tenet of “smashing” political enemies. Had they tried, it likely would have been too difficult to specify the requisite mindset defining the implicit enemies they sought (any definition would likely have been far too narrow). Ultimately, it was far more efficient to simply arrest, torture to produce confessions of unspecified crimes, and execute.¹³⁵

134. PONCHAUD, *supra* note 80, at 51.

The Khmer methods do not require a large personnel; there are no heavy charges to bear because everyone is simply thrown out of town . . . [T]he Khmers have adopted the method which consists in overturning the basket with all the fruit inside; then, choosing the articles that satisfy them completely, they put them back in the basket. [Others] did not tip over the basket, they picked out the rotten fruit. The latter method involves a much greater loss of time than that employed by the Khmers.

Id. (quoting a Thai journal that conducted an interview with a Khmer Rouge official).

135. Perhaps the Center's only major showing of bureaucracy was the procedure followed in torture camps such as Tuol Sleng. Prisoners were photographed upon arrival and after execution, and detailed records of torture and interrogation were kept. *See, e.g.,* GLOVER, *supra* note 7, at 308.

The Yale University Cambodian Genocide Program provides a database featuring more than 5,000 images of Tuol Sleng prisoners, each of them photographed as they entered the camp. The identities of the vast majority of these victims are unknown, and visitors may

To the Nazis, one was Jewish or not based on physical appearance or bloodlines; to the Khmer Rouge, one could not be as easily dismissed as a non-enemy as one's state of mind cannot be measured as easily as a skull.¹³⁶ The methods of determining political enemies resembled witch-hunts—arresting men, women, and children, and torturing them until they confessed. Whereas it is believable that seekers of an explicit enemy have a defined purpose and would stop after the enemy has been vanquished, seekers of an implicit enemy may never stop killing so long as victims keep confessing under torture.

VI. CONCLUSION

The Nazis used a legal system to commit genocide because their institutional embrace of bureaucracy made them dependent on law to accomplish their goals, and their enemies were explicit and thus easily definable under law. In building a wall of legal disenfranchisement around the Jews that effectively removed any hope of state protection, political representation, economic livelihood, or creation of personal bonds with Germans, the line that would eventually determine who would be sent to the death camps was drawn.

The Khmer Rouge did not use a legal system to commit genocide because their revolutionary ideology was not conducive to formal government or lawmaking, and their enemies were implicit and not easily definable under law. Their policy of violence extended from overthrowing the Lon Nol regime to forcing citizens to comply with the Center's grand scheme, and their consequentialist ideology broadened from killing people through forced work and relocation to the torture and execution of political enemies.

A final thought: Perhaps more striking than the difference in ends (purity of race vs. purity of society) and means (reinventing mankind through law versus reinventing civilization through sheer terror) of the two regimes is the similarity of the horror they caused. Both fascists coming to power through recognized political channels employing legal means, and communists seizing power through revolution employing extra-legal means turned innocents into enemies and brutally murdered millions of people. The lesson is simple: evil wears many masks, but its roots remain constant and shall continue to bear sour fruit. Fighting genocide requires looking past the limiting conventional standards of recognition and towards the reality that humanity's greatest evil can emerge from almost any circumstances—looking past the finger and towards the direction in which it points.

conduct age and gender searches to assist with the identification. Cambodian Genocide Program, YALE UNIVERSITY, PHOTOGRAPHIC DATABASE, at <http://www.yale.edu/cgp/img.html> (last visited Aug. 8, 2003).

136. See *supra* text accompanying note 64.